

ORIGINAL

D&F
c/m

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
KINGSLEY BERNARD,

Petitioner,
-against-

MEMORANDUM AND ORDER

Case No. 09-CV-3270 (FB)

UNITED STATES OF AMERICA,

Defendants.
-----X

Appearances:

For the Petitioner:

KINGSLEY BERNARD, *Pro Se*
No. 56134-004
Federal Complex-USP1
P.O. Box 1033
Coleman, Florida 33521

For the Respondent:

BENTON J. CAMPBELL, ESQ.
United States Attorney
Eastern District of New York
By: AMIR TOOSSI, ESQ.
Assistant United States Attorney
271 Cadman Plaza East
Brooklyn, New York 11201

BLOCK, Senior District Judge:

Kingsley Bernard ("Bernard"), appearing *pro se*, seeks to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Bernard was a member of a well-organized and extremely violent robbery crew; following a jury trial, he was convicted of one count each of: conspiracy to obstruct commerce by robbery (18 U.S.C. § 1951); obstruction of commerce by robbery (18 U.S.C. § 1951); attempt to obstruct commerce by robbery (18 U.S.C. § 1951); murder during a crime of violence (18 U.S.C. § 924); and two counts of use of a firearm in a crime of violence (18 U.S.C. § 924). He was sentenced on December 1, 2004, to a term of life in prison on the murder charge plus thirty years on the other charges. His conviction and sentence were affirmed on direct appeal. *United States v. Bernard*, 151 Fed. Appx. 76 (2d Cir. 2005); *see also United States v. Bernard*, No. 98-CR-500,

Docket Entry No. 403 (E.D.N.Y. Nov. 17, 2005) (noting receipt of Second Circuit mandate affirming conviction and sentence).

Bernard's § 2255 petition is clearly untimely. *See* 28 U.S.C. § 2255(f) (specifying periods of limitation under Antiterrorism and Effective Death Penalty Act ("AEDPA")). AEDPA's one-year period of limitation begins to run as of "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(f)(1). "[A] judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction. *Clay v. United States*, 537 U.S. 522, 525 (2003).

Bernard's judgment of conviction was final in February 2006, once his 90 days to seek Supreme Court review expired. *See* Sup. Ct. R. 13(1) (setting 90-day limit). His opportunity to seek relief under § 2255 therefore expired sometime in February 2007 – 29 months before he filed this petition. Bernard claims that an untimely certiorari petition cures this deficiency, but he waited more than three years to file that petition; it was denied. *See* Docket, *Bernard v. United States*, No. 08-8925 (Feb. 13, 2009) (noting receipt of petition); *cert. denied*, 129 S.Ct. 1658 (Mar. 23, 2009).¹ His certiorari proceedings have no bearing on the timeliness of this petition.

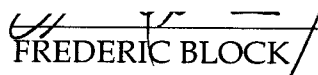
Bernard does not refer to an "impediment . . . created by governmental action" that prevented him from filing his petition. 28 U.S.C. § 2255(f)(2). Nor does he refer to any retroactive rights that have been newly recognized by the Supreme Court.

¹ The docket of the Supreme Court is available online at: <http://origin.www.supremecourtus.gov/docket/08-8925.htm> (last viewed Jan. 25, 2010).

28 U.S.C. § 2255(f)(3). Nor does he refer to any new facts. 28 U.S.C. § 2255(f)(4). In sum, Bernard offers no explanation why AEDPA's statute of limitations does not bar his petition.²

Bernard's petition is dismissed as untimely.³ No certificate of appealability will be issued since he has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

SO ORDERED.

/S/

FREDERIC BLOCK/
Senior United States District Judge

Brooklyn, New York
January 29, 2010

² Bernard is keenly aware of the strictures of AEDPA's statute of limitations. He argues that § 2255 is "inapplicable" because of his untimely certiorari proceedings and that "[a]ny reference about time bar is clearly erroneous and should not be entertained by the court[.]" Pet'n at 14, 18. Bernard is incorrect, or else a § 2255 petitioner would be able to restart the limitations period – at any time – by filing an untimely petition for certiorari.

³ The strictures of AEDPA's limitations period work no injustice to Bernard; the Court has reviewed his claims of error and finds each to be without merit for the reasons set forth in the Government's memorandum. *See* Gov't Mem. in Opposition, Docket Entry No. 7, at 13 (ineffective assistance of counsel), 14-18 (confrontation clause), 18-19 (element of interstate commerce), 28-29 (type of firearm used in firearm convictions), 30 (DOJ's Petite policy), 31-32 (application of U.S.S.G. § 2A1.1), 34 (imposition of consecutive mandatory minimums for firearm convictions) (Dec. 24, 2009); *see also* *Clanton v. United States*, 284 F.3d 420, 426 (2d Cir. 2002) (district court may adopt specific portions of Government's memorandum to dispose of § 2255 petition).